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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 FEB 19 AM 11:06

JEANNE HICKS, CLERK

BY: Heather Figueroa

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S AMENDED RESPONSE TO
DEFENDANT'S MOTION TO
PRECLUDE LATE DISCLOSED
WITNESSES AND EXPERTS AND
DISMISS DEATH PENALTY AS
SANCTION

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Motion to Preclude late disclosed witnesses and experts and dismiss death penalty as sanction. The State of Arizona's Response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The June 22, 2009 disclosure order was for the State to disclose everything of a factual nature in the State's possession as of that date. *Ariz. R. Crim. P.*, Rule 15.6(a) mandates that each party has a continuing duty to make additional disclosure of new or different information as it is discovered. In the Minute Entry dated June 3, 2009, the Court acknowledged that "[t]he State has a continuing obligation to make disclosure in a timely fashion." The state cannot be

1 ordered to disclose items under Rule 15.1(b) that it does not yet have in its possession. *See*
2 *Ariz. R. Crim. P.*, Rule 15.1(b); *State v. Newell (Milagro)*, 221 Ariz. 112, 210 P.3d 1283 (App.
3 2009). Rule 15.6(b) allows on-going disclosure up to 30 days before trial. Only when
4 disclosure is anticipated to be made after that time is the disclosing party required to notify the
5 court and other parties of the date the disclosure will be available. Rule 15.6(c) provides that,
6 unless otherwise permitted, the final deadline for disclosure is at least seven days prior to trial.
7

8 The State has and will continue to work diligently to make sure that evidence and
9 witnesses are disclosed according to the Rules of Discovery.

10 In *State v. Tucker*, 157 Ariz. 433, 759 P.2d 579 the Arizona Supreme Court addressed
11 the issue of the State's failure to make proper disclosure of witnesses.

12 Defendant Tucker was arraigned for one count of first degree Murder on August 27,
13 1984. In October 1984 the Defense provided the State with a list of potential defenses. The
14 trial was set for August 13, 1985. Defense counsel requested a list of witnesses from the
15 prosecutor. After two weeks the Defense had not received the requested list from the
16 prosecutor and promptly filed a motion for its disclosure. The court granted the motion and
17 ordered the State to disclose its witnesses by July 5, 1985. The State failed to provide the list
18 to the Defense. The Defense requested sanctions against the State for its failure to disclose
19 the list of witnesses. On July 15, 1985 the State provided the Defense with its list of
20 witnesses pursuant to a second order to disclose issued by the Court.
21
22

23 The Defense objected to the list of witnesses because they believed the State had
24 provided a list of everyone who was mentioned in the police reports. The list was provided
25 approximately one month before trial. The Defense argued that it could not interview the
26 witnesses listed in time and thus did not have time to adequately prepare for trial. The State

1 argued that they disclosed “everybody to prevent being accused of hiding witnesses” and
2 because they were unsure of the accuseds defenses and the issues that might require rebuttal.
3 The trial court ruled that the State’s disclosure was not improper and “that the list was not
4 made in bad faith.”

5 The Court of Appeals upheld the trial court’s ruling:

6 “However, the Constitution does impose on the prosecution a due process
7 obligation to disclose exculpatory evidence that is material on the issue of guilt or
8 punishment. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United*
9 *States v. Bagley*, 473 U.S. 667, 676-684, 105 S.Ct. 3375, 3380-85, 87 L.Ed.2d 481 (1985).
10 Under this doctrine, the defendant is denied a fair trial only if there is a reasonable
11 probability that, had the exculpatory evidence been disclosed, the result of the proceeding
12 would have been different. *Bagley*, 473 U.S. at 685-686, 105 S.Ct. at 3385.

13 Under the reasoning of *Brady* and its progeny, Tucker was not denied a fair trial by
14 any nondisclosure or untimely disclosure of witnesses. Tucker does not argue, nor do we find
15 any evidence in the record, that any of the witnesses were the source of exculpatory
16 evidence. Indeed, each of the arguably untimely-disclosed witnesses, and especially
17 Burwell¹, provided incriminating testimony. Therefore, the State had no constitutional duty
18 to disclose any of these witnesses, so any untimely disclosure or nondisclosure did not
19 violate constitutional precepts.”

20 The Court of Appeals was disturbed by the State’s violation of the “spirit of Rule 15
21 by failing to respond to defense counsel’s written request for disclosure, by disregarding the
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26 ¹ Burwell was disclosed during the course of the trial. She testified regarding statements the Defendant made to her and that she overheard the Defendant make to others. The Court ruled her testimony was admissible since the Defendant had prior knowledge of the statements that Burwell would be testifying about. The court stated that Burwells testimony may have been a surprise, the content of her testimony was not.

1 trial court's order to provide a list of witnesses by a certain date, and by finally disclosing a
2 witness list no more specific or helpful in identifying persons who would testify than the
3 previously disclosed police reports. However, as much as we condemn the prosecutor's
4 behavior in this case, we are unconvinced that Tucker suffered any prejudice as a result of
5 this violation."

6
7 The Defense in the case at bar has continually attacked the State for untimely
8 disclosure. Unlike the prosecutor in *Tucker*, the State has made every effort to comply with
9 Rule 15 or at least the spirit of Rule 15. The list of witnesses provided by the State has been
10 ongoing since the beginning of this case. The State cannot and should not be ordered to
11 preclude witnesses when their testimony is vital to the State's case and the Defense has
12 suffered no prejudice.

13 The Defense is asking the State to name each and every page of each and every
14 document it intends to use at trial. Any attempt to limit the amount of disclosure the State
15 will use at trial puts an unfair burden on the State's ability to try its case. To request this
16 information is an attempt to dictate the State's trial strategy and is not disclosure that is
17 required under Rule 15 or this Court's orders.

18
19 Both the State and the Defense should not be limited at trial to only the specified
20 documents it names prior to trial. This is simply not good trial strategy. Neither side can
21 predict how a witness will testify or the twists and turns of a complex case in trial. The State
22 should not be required to limit its evidence only to those items it has specifically named
23 ahead of trial. Rather the State, like the Defense, should have the opportunity to use any of
24 the disclosure during trial.

25
26 The Defense has identified some specific items that the State will address.

1 **A. DPS DISCLOSURE:**

2 Contrary to the Defense's inference that the State was not prompt with its disclosure,
3 the State requested this information from the DPS before it was received. The State is not in
4 control of how long an analysis will take or when a report will be finalized. The time
5 between a request and a final report can take months. The State can only disclose those
6 reports that are completed and its possession. This disclosure was made promptly upon its
7 receipt.
8

9 **Corrective action logs:** DPS does not have a corrective action log.

10 **STR Frequency Tables:**

11 The disclosure of the allelic frequency tables is through the following
12 periodicals:

13 A) Budowle B, Moretti TR, Baumstark AL, Defenbaugh DA, Keys KM.
14 Population data on the thirteen CODIS core short tandem repeat loci in
15 African Americans, U.S. Caucasians, Hispanics, Bahamians, Jamaicans,
16 and Trinidadian. JForence Sci 1999;44 (6):1277-1286.

16 B) Budowle B, Shea B, Niezgoda S, Chakraborty R. CODIS STR loci
17 data from 41 sample populations. JForensic Sci 2001;45;(3):453-489.

18 **B. James Knapp cell phone information:**

19 There is no harm in any late disclosure of Mr. Knapp's cell phone information. First,
20 the information requested by Defense is not exculpatory. This information could have been
21 discovered by the Defense's own investigation of Mr. Knapp. Second, Mr. Knapp is not a
22 suspect in this case. Supplement #118 prepared by Det. McDormett demonstrates that James
23 Knapp's alibi is reliable.
24

25 **C. Experts:**

26 Ron Castle: The State does not plan to call Ron Castle as a witness at this time.

1 Susan Kossler: The State does not plan to call Susan Kossler as a witness at this time.
2 Gregory Cooper has been substituted as a witness due to Kossler's unavailability.

3 Dr. Steven Pitt: The State may call Dr. Pitt as a rebuttal witness. His testimony is reliant
4 upon the Defense presenting its case.

5 Richard Echols: Any objection to Mr. Echols is moot. The Court has previously
6 ruled that Mr. Echols will be allowed to testify at trial. Additionally the State
7 provided the Defense with additional documents to be used at trial on January 29,
8 2010.

9 Commander Mascher: The State only recently learned of Commander Mascher's
10 expertise in tracking. He was disclosed as soon as the State became aware of his
11 qualifications. Furthermore, the Defense has been aware of Commander Mascher's role
12 in this case in tracking the footprints that were left at the scene.

13 **D. Indexing Systems:**

14 **FINGERPRINTS:**

15 The indexes searched for latent prints are included on the report.

16 Report: Aug 27, 2008 "#803 searched AZAFIS"

17 Report: Aug 21, 2008 "#852 searched AZAFIS"

18 **DNA:**

19 There is no paperwork generated for CODIS searches other than when the profile is
20 submitted and if a hit (is) generated. A search is done at least once a month of indexes at the
21 state level. The protocol also includes the information for the national level. The index for
22 the item is listed on the generated paperwork in the report notes as previously indicated. The
23 State is attaching a copy of the CODIS Standard Operating Procedures and CODIS
24 Procedures manual for the defense.

25 The previous information was provided by Kortney Snyder. She has answered the
26 Defense requests to the best of her ability. Should the Defense require more information or
clarification, an interview with Miss Snyder would be the best way to resolve the issues.

1
2 **E. Jail Calls:**

3 Supplement No #126 previously disclosed by the State identifies all jail calls which
4 the State may rely upon at trial. All other statements are identified with sufficient specificity.

5
6 **F. Forensic Testing**

7 The State has complied with the Court's order. On January 29, 2010 the State disclosed
8 the only two items that would be returned for further testing. Those items, #505 the checkbook
9 cover and #518 the receipt found in trash can, have been analyzed. The State is waiting on the
10 final results but has confirmed verbally with the DPS lab that all results are negative. Any
11 further testing will be disclosed in compliance with the Court's order.

12
13 **G. Recently Disclosed Witnesses:**

14 The Defense has misstated the State's position on calling six witnesses: Debbie Hill,
15 Paula Matthew, Dr. Rubin, Dean Shank, Marjorie Powell and Brandon Stafford. The State
16 indicated to the Defense that these witnesses were **likely not** to be called or would be called
17 as rebuttal witnesses. Specifically, Dr. Rubin could be called to testify if the Defendant takes
18 the stand and lies under oath.

19 **Late disclosure:** The supplements written by Det. Hobbs (Bates 17343-17345) are
20 cumulative. There is no harm in the disclosure of these reports.

21
22 **Back Country Search Team**

23 The State did not learn of the search team until just recently. However, they were
24 mentioned in police reports disclosed months ago, Supplement 6, Bates 628. As soon as the
25 State learned about the team they were promptly disclosed as potential witnesses. Defense has
26

1 requested interviews with each member of the team that the State is in the process of
2 scheduling. Under *Tucker*, the witnesses should be allowed to testify.

3 **Richard Ach:** Richard Ach is a rebuttal witness for Defendant's mitigation evidence.

4 **Brian Fagan, Gareth Richards, Mark Day, Jonathan Lantz and**
5 **Eric Gilkerson and Shoe Print Reports:**

6 These are all newly discovered witnesses pertaining to the discovery of the shoes
7 purchased by Defendant in the year 2006 which match the footprints found on the land behind
8 the Bridal Path residence. This evidence was discovered on January 28, 2010, through many
9 hours of reviewing the financial record and credit card receipts of Defendant which evidenced
10 the purchase of the shoes from Outdoor ProLink. Disclosure of these witnesses was made
11 under the State's continuing duty to make additional disclosure of new or different information
12 as it is discovered pursuant to Rule 15.6(a). Once the State came into possession of the shoe
13 print reports, these documents were promptly disclosed to the defense.

14 **H. Crime Scene Diagrams:**

15 The State has continually disclosed all materials in its possession at the time the request
16 was made. The second disclosure of the diagrams provided more detailed information. The
17 Defense has failed to provide any legal basis for exclusion of this evidence.
18

19 **I. DPS Computer Forensic Reports:**

20 The Defense was provided with mirror images of the ipods, flash drives, harddrives,
21 CDs and DVDs as far back as January 2009. The State has the burden of analyzing all the
22 documents that were retrieved from the digital devices. These items were in the possession of
23 the Defendant prior to his arrest and he has firsthand knowledge of the contents of each
24 device. (*State v. Tucker*, 157 Ariz. 586, 759 P.2d 440 (1988). There is no prejudice to the
25 Defense.
26

1 J. **Aggravating Factors:**

2 The State filed a Notice on June 29, 2009 identifying the experts and documents that
3 would be used in support of the aggravating factors in the penalty phase.

4 **II. Dismissal of Death Penalty**

5 The State has complied with Rule 15.1 and Rule 15.6. The State has the right under
6 Rule 15.6 (b) to disclose evidence up to 30 days prior to trial. There are no violations of the
7 Rules of Discovery and dismissal of the death penalty as a sanction is without merit.
8

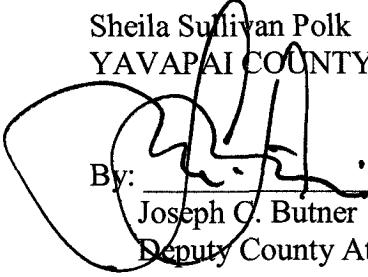
9 **Conclusion:**

10 The Defense argument that it does not have adequate time to prepare for trial is without
11 merit. The Defendant has continually failed to show any actual prejudice by the State's
12 ongoing disclosure of witnesses and experts.

13 The State respectfully requests that Defendant's Motion to Preclude Late Witnesses,
14 Experts and Evidence be denied.
15

16 RESPECTFULLY SUBMITTED this 19 February, 2010.

17
18 Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

19
20 By: 
21 Joseph C. Butner
22 Deputy County Attorney

23 ///

24 ///

25 ///

26 ///

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COPIES of the foregoing delivered this
19th day of February, 2010 to:

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